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ABSTRACT

In an effort to depoliticize design-build contracts, the Commonwealth of Virginia created a management review board to determine whether a locality should be authorized to use a design-build contract in lieu of competitive sealed bidding. This paper explains that process. In order to employ a design-build contract for a specific construction project, the Commonwealth and its departments, institutions, and agencies must seek and secure the prior approval of the Director of the Division of Engineering and Building. For public bodies other than the Commonwealth and its departments, institutions, and agencies, the public body must seek and secure the approval of the Design-Build/Construction Management Review Board prior to using a design-build contract for a specific construction project. For such contracts, prior to determining whether to use a design-build approach for a specific project, a professional advisor must be enlisted and a request for review submitted; the review process includes a judicial review. Information on the selection, evaluation, and award of design-build contracts is covered, as are details on proposal requests, the selection of qualified offerors, and project evaluation. (RJM)

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by James K. Lowe, Jr.

Commonwealth of Virginia Department of Education Facilities Conference
February 23, 1998

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Design-Build Contracting by Virginia Public Bodies

by James K. Lowe, Jr.*

Since 1987, the annual U.S. domestic volume of design-build construction has grown from $6 billion to $56 billion and now represents 18 percent of the non-residential U. S. market. Industry experts predict a continued growth in the design-build construction market, resulting in a design-build market of at least 50% of domestic non-residential construction.[1] While the popularity of design-build may be growing in the private sector, its inroads into the public sector have been slower and less dramatic, especially in the Commonwealth of Virginia. Nonetheless, the use of design-build by the public sector is on the rise. Between 1987 and 1996, the Virginia General Assembly granted 34 special exemptions, authorizing the use of design-build (or construction management) contracts in lieu of competitive sealed bidding. In an effort to "de-politicize" the process, the General Assembly, in 1996, created the Design-Build/Construction Management Review Board, which replaced the General Assembly as the body that determines whether a locality should be authorized to use a design-build contract in lieu of competitive sealed bidding.

The Commonwealth and its Departments, Institutions, and Agencies

Before the enactment of the Virginia Public Procurement Act ("VPPA") in 1982, the Attorney General, in a 1977 opinion, had concluded that neither the Commonwealth nor its departments, institutions, or agencies, nor cities, counties, or towns were authorized to enter into "fixed price design/build" contracts because such contracts were inconsistent with the competitive bidding requirements then in effect in Va. Code § 11-17.[2] In 1980, the General Assembly enacted Va. Code § 11-17.1, authorizing the use of design-build contracts by the Commonwealth until July 1, 1983.[3] With the enactment of the VPPA during the 1982 Session of the General Assembly, Va. Code § 11-17.1 was allowed to expire, being replaced with Va. Code § 11-41.2, which was to be effective until July 1, 1988.[4] The expiration date for Va. Code § 11-41.2 was removed in 1988.[5]

Under Va. Code § 11-41.2, the Commonwealth and its departments, institutions, and agencies are required to follow procedures adopted by the Secretary of Administration for the procurement of design-build contracts. These procedures were adopted by the Secretary on September 7, 1988, and are included in Chapter 11, "Special Procedures," of the December 1996 *Commonwealth of Virginia Construction and Professional Services Manual for State Agencies* published by the Department of General Services, Division of Engineering and Buildings, Bureau of Capital Outlay Management.

Under the procedures adopted by the Secretary of Administration, design-build contracts may only be used on building projects within the following general categories: warehouse/storage buildings; garage/maintenance shops; general mercantile buildings; single-story administrative buildings; recreational and concession buildings; exhibition and agricultural buildings; and housing.[6] Departments, institutions, and agencies of the Commonwealth wishing to utilize a design-build contract must first submit a written request to the Director, Division of Engineering and Buildings ("DEB"), justifying the use of design-build. The request must substantiate that design-build is more advantageous than a competitive sealed bid construction contract and must indicate how the Commonwealth will benefit from using design-build. The request must also include a written justification for the conclusion that sealed bidding is not practical and/or fiscally advantageous.[7]

Once its request has been approved, a department, institution, or agency of the Commonwealth (hereinafter collectively referred to as an "agency") must use a two-step competitive negotiation process for procuring of design-build services.[8] In a two-step competitive negotiation process, the procuring agency first publishes a request for qualifications ("RFQ") seeking qualification submittals from interested potential offerors. Under the guidelines established by the Secretary of Administration, the agency must publish its RFQ in at least two daily newspapers and in the *Virginia Business Opportunities* ("VBO"). The requirement to publish the RFQ in the VBO may be waived by the Director, DEB, if an expedited process is required.[9] In addition, the agency must appoint an evaluation committee, which must include either a licensed architect or registered professional engineer from DEB. Agency representatives should include licensed architects and/or registered professional engineers, if possible.[10]

The committee evaluates the qualification submittal of each responding potential offeror, as well as any other relevant information. Based upon the committee's evaluation, the committee then selects (i.e., "short lists") no more than five offerors deemed most suitable for the project.[11]

In step two, the agency, using the evaluation committee's list of prequalified potential offerors, submits its request for proposal ("RFP") to a minimum of two and a maximum of five potential design-build offerors deemed to be most suitable for the project.[12] The agency's RFP must detail its facility requirements, building and site criteria, site and survey data, criteria to be used to evaluate submittals, and other relevant information, and shall invite the offeror to submit a technical and cost proposal for the project.[13] When submitting their proposals, design-build offerors are to seal their technical proposals separately from their cost proposals. Technical proposals are provided to the evaluation committee, while cost proposals are turned over to the agency's treasurer/fiscal officer, who secures and keeps them sealed until evaluation of the technical proposals and design development negotiations between the agency and each design-build offeror have been completed.[14]

The evaluation committee evaluates each design-build offeror's technical proposal based upon the criteria contained within the agency's RFP. The agency informs each design-build offeror of any adjustments deemed necessary to make the offeror's technical proposal to comply fully with the RFP. In addition, the agency may require that offerors make design adjustments made necessary by project improvements and/or additional detail identified by the evaluation committee during the evaluation process.[15]

Based upon any revisions to the RFP and/or a design-build offeror's technical proposal, the evaluation committee and the offeror may negotiate additive and/or deductive amendments to the offeror's cost proposal. In addition, the design-build offeror may submit cost deductions from its original sealed cost proposal which are not based upon revisions to the RFP and/or the offeror's technical proposal.[16] At the conclusion of negotiations, the evaluation committee publicly opens, reads aloud, and tabulates the design-build cost proposals, adding to or deducting from any proposal cost adjustments contained in amendments submitted by a design-build offeror.[17]

The evaluation committee then recommends a design-builder to the agency head based upon its evaluation of the various technical proposals and its negotiations with the respective design-build offerors. The agency head makes the final selection. Unless the agency has received the approval of the Director, DEB, to award on an alternate basis and such alternate basis is described in the criteria to be used to evaluate submittals as part of the agency's RFP, the award of the design-build contract must be made to the offeror who submits an acceptable technical proposal at the lowest cost.[18]

The agency must notify DEB of the agency head's selection and request authority from the governor to award a design-build contract. Upon receiving the governor's approval, the agency shall notify all design-build offerors which offeror was selected for the project. In the alternative, the agency may notify all design-build offerors of the agency's intent to award a design-build contract to a particular offeror at any time after the agency head has selected a design-builder without waiting for the governor's approval.[19]

Public Bodies Other Than the Commonwealth

While Va. Code § 11-41.2 authorizes the use of design-build contracts by the Commonwealth, it is silent on the use of design-build contracts by political subdivisions. In 1987, the VPPA was amended to grant design-build authority for the first time to a public entity other than the Commonwealth and its agencies. Effective July 1, 1987, the then-newly enacted Virginia Code § 11-41.2:1 authorized the City of Richmond to use a design-build (or construction management) contract to construct a visitors center. Between 1988 and 1995, 24 additional authorizations design-build (and/or construction management) contracts were granted by the General Assembly through the introduction and passage of special enabling legislation.[20] The 1996 Session of the General Assembly yielded eight additional special authorizations, bringing the total special exemptions to 34.

In recognition that the exception was tending towards becoming the rule, the House of Delegates, with the Senate concurring, agreed to House Joint Resolution ("HJR") No. 643 during the 1995 Session of the General Assembly. HJR No. 643 provided, in pertinent part, that

> WHEREAS, the authority of public bodies other than the Commonwealth to enter into contracts on a fixed-price, design-build or construction management basis should be examined for consistency with the best governmental procurement policies which promote the availability and retention of high quality goods and services at reasonable cost from qualified vendors bidding in a competitive environment and also for consistency with the short-term and long-term interests of public bodies in the expenditure of public funds for construction projects; now, therefore, be it
>
> RESOLVED by the House of Delegates, the Senate concurring, That a select joint subcommittee of the House Committee on General Laws and the Senate Committee on General Laws be established to study the effect of authorizing design-build and construction management contracts for public bodies. The select joint subcommittee shall examine the effect of authorizing public bodies other than the Commonwealth to enter into contracts for construction projects on a fixed-price, design-build basis or construction management basis.

In testimony before the Joint General Laws Subcommittee, the view of local governments was espoused by the Virginia Municipal League ("VML") and the Virginia Association of Counties ("VACO"). VML and VACO argued that local governing bodies, as protectors of the public treasury, must be allowed flexibility to determine the most appropriate method of delivering construction services in order to ensure that such services are delivered in a cost-effective and timely manner. They further argued that by the time local governments know they want to use design-build, it is too late to seek authorization from the General Assembly. Thus, VML and VACO contend, local governments sought design-build authorization primarily as a planning tool so that when need for a new public facility arises, the project delivery options would already be in place.[21]

In opposition to the views espoused by local governments, the Associated General Contractors ("AGC"), Virginia Society of The American Institute of Architects ("VSAIA"), Virginia Society of Professional Engineers ("VSPE"), and Consulting Engineers Council of Virginia ("CECV"), representing the views of contractors and design professionals, opined that the use of design-build in the

public sector was not in the best interest of taxpayers. These organizations argued that the use of design-build in the private sector differs materially from its use in the public sector--in the private sector, the risk of loss falls to the owner and its shareholders, whereas in the public sector, the risk of loss falls to taxpayers. The AGC, VSAIA, VSPE, and CECV represented to the subcommittee that there are three types of work--cheap, quick, and good. "A client can have any two: cheap and quick won't be good; cheap and good won't be quick; and quick and good won't be cheap."[22]

In support of its opposition to the use of design-build in the public sector, the design community highlighted the change in role for the design professional. Under the traditional design-bid-build delivery system, the design professional is employed directly by the owner and thus its contractual obligations run to the owner. In contrast, under a design-build scenario, the design professional is typically employed by the design-builder (most likely a general contractor) and its obligations, therefore, run to the design-builder and not to the owner.[23] In the eyes of the design community, the loss of the design professional as an independent professional advisor to the owner is contrary to public interest.[24]

Finally, the contractors and design professionals argued that since the first enactment of the design-build exception for public bodies other than the Commonwealth in 1987, too many requests had been made for design-build authorization, effectively undermining the general prohibition against the use of design-build, as well as the general preference for the traditional design-bid-build/competitive sealed bidding process.[25]

In its final report, the subcommittee noted that although the evidence was divided on whether design-build is a viable project delivery system for the public sector, the question was best addressed by a panel of experts in the field, and not by the General Assembly. The subcommittee thus recommended creation of a state review board to replace the General Assembly as the body charged with determining whether a locality should be authorized to use a design-build contract in lieu of competitive sealed bidding. As recommended by the subcommittee, the review board's responsibilities would include: (i) reviewing submissions of a local governing body desiring to construct a public facility using a design-build contract; (ii) approving or disapproving a request for design-build authority; (iii) making post-project evaluations of authorized projects to determine the value of design-build contracts in the public sector; and (iv) conducting a multi-year study of authorized design-build projects and reporting to the governor and General Assembly its findings and conclusions relative to the advisability of the use of design-build contracts by local governing bodies.[26]

In response to the work of the Joint General Laws Subcommittee, the 1996 session of the General Assembly enacted Va. Code § 11-41.2:2 through § 11-41.2:5, creating the Design-Build/Construction Management Review Board (the "review board").[27] The review board is composed of nine members appointed by the governor as follows: the Director of DEB, or his designee; two Class A general contractors selected from a list recommended by AGC; one architect and one engineer selected from a list recommended by CECV, VSAIA, and VSPE; and four representatives of public bodies other than the Commonwealth selected from a list recommended by VML and VACO. The Director of DEB (or his designee) is a nonvoting member of the review board, except in the event of a tie vote.[28] Initial terms of review board members are as follows: three members were appointed for 2-year terms, three members were be appointed for 3-year terms, and three members were appointed for 4-year terms. Future appointments will be for terms of 4 years, except that appointments to fill vacancies shall be for the unexpired terms. No person is eligible to serve for more than two successive full terms, except the Director of DEB, who shall serve until a successor qualifies.[29] The review board is required to meet monthly; however, monthly meetings may be canceled by the chairman if there is no business.[30]

Subsection B of Va. Code § 11-41.2:4 specifies that on or before July 1, 1997, the review board "shall adopt regulations, as it deems appropriate, based on the substantive requirements of Chapter IX of the Capital Outlay Manual of the Commonwealth, for a two-step competitive negotiation process which shall be applied to design-build . . . projects undertaken by public bodies other than the Commonwealth."[31] Subsection B further provides that "[s]uch regulations, upon final adoption, shall supersede the provisions of subdivisions A 1 a and A 1 b of § 11-41.2:2." Those regulations of the review board adopted pursuant to Va. Code § 11-41.2:4.B during the review board's first year of operation were exempt from the requirements of the Administrative Process Act (§ 9-6.14:1 et seq., the "APA"). Future regulations must be adopted in accordance with the APA.

The initial meeting of the review board was conducted on September 27, 1996. Over the next 10 months, the review board met monthly to draft the required regulations and to act on requests from local governing bodies. The review board's final regulations were adopted at the board's June 12, 1997, meeting, became effective on July 10, 1997, and are divided into seven parts as follows: Part I, Definitions (Virginia Administrative Code ("VAC") cite: 1 VAC 17-20-10); Part II, Design-Build/Construction Management Review Board (1 VAC 17-20-20 through -60); Part III, Professional Advisor (1 VAC 17-20-70 through -80); Part IV, Request for Review (1 VAC 17-20-90 through -160); Part V, Selection, Evaluation, and Award of Design-Build Contracts (1 VAC 17-20-170 through -220); Part VI, Selection, Evaluation, and Award of Construction Management Contracts (1 VAC 17-20-230 through -300); Part VII, Project Evaluation (Including Delayed or Abandoned Projects) (1 VAC 17-20-310 through -320).

Professional Advisor

In accordance with Va. Code § 11-41.2:2.A and 1 VAC 17-20-70, prior to determining whether to use design-build for a specific construction project, the public body shall have in its employ or under contract an architect or professional engineer with professional competence appropriate to the project who shall advise the public body regarding the use of design-build for that project, and who shall assist the public

body with preparing the RFP for that project.[32] For the purposes set forth in 1 VAC 17-20-70, the review board, in accordance with 1 VAC 17-20-80, will consider the following in reviewing the competency of the professional advisor:

1. education, training, and general experience;

2. prior experience with projects of similar size, scope, and complexity; and

3. prior experience with design-build contracts or substantially similar experience.

REQUEST FOR REVIEW

Prior to identifying its first design-build project, a public body should consider putting into place the necessary procurement regulations. Va. Code § 11-41.2:4.A.1 and 1 VAC 17-20-100 provide that a public body may request that the review board review its draft or adopted ordinance or resolution to determine if the process proposed or adopted by the public body for the selection, evaluation, and award of a design-build contract complies with the provisions of Va. Code § 11-41.2:2.A.1 and the review board's regulations. Such requests should be addressed to: Design-Build/Construction Management Review Board; c/o Commonwealth of Virginia; Department of General Services; Director, Division of Engineering and Buildings; 805 East Broad Street, Room 101; Richmond, Virginia 23219-1989.

When requesting review of a specific construction project pursuant to 1 VAC 17-20-110, the public body's request must be accompanied by the following:

1. evidence that the public body has in its employ or under contract an architect or professional engineer to advise the public body regarding the use of a design-build contract, and to assist the public body with preparing the RFP;

2. a certified copy of the ordinance or resolution adopting the public body's written procedures governing the selection, evaluation, and award of design-build contracts (or, in the alternative, if the ordinance or resolution has been previously submitted to and approved by the review board, a copy of the review board's letter of approval);

3. if not a part of the adopted ordinance or resolution, a certified copy of the public body's written procedures governing the selection, evaluation, and award of design-build contracts (or, in the alternative, if the written procedures have been previously submitted to and approved by the review board, a copy of the review board's letter of approval);

4. the public body's findings as to the specific construction project under consideration, that (i) a design-build contract is more advantageous than a competitive sealed bid construction contract; (ii) there is a benefit to the public body by using a design-build; and (iii) competitive sealed bidding is not practical or fiscally advantageous; and

5. a written narrative describing the criteria of the specific construction project under consideration in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications.

The public body's findings shall include the information and data upon which the findings are based. Such information and data shall, as a minimum, include estimates for cost and time using traditional design-bid-build procedures, as compared with proposed design-build procedures.

Va. Code § 11-41.2:5 and 1 VAC 17-20-120 require that the review board render a decision upon a public body's request for review within 60 days of receiving the request, unless a different timetable is agreed to by the public body.[33] If no decision is made by the review board within the specified 60-day period (or as otherwise agreed to by the public body), the public body's request for authorization to use a design-build contract for a specific construction project is deemed approved. Va. Code § 11-41.2:5 and 1 VAC 17-20-120 further provide that if the review board determines that the public body has complied with the provisions of Va. Code § 11-41.2:2 and the review board's regulations, and that the findings made by the public body pursuant to Va. Code § 11-41.2.A.2 and the review board's regulations are not unreasonable, the review board must approve the use of a design-build contract by the public body for the specific construction project under consideration. However, if the review board determines that (i) the public body has not complied with the provisions of Va. Code § 11-41.2:2 and/or the review board's regulations, or (ii) the findings made by the public body pursuant to Va. Code § 11-41.2:2.A.2 are unreasonable, the review board shall disapprove such use, and the public body may not use a design-build contract to procure construction of the proposed project. Pursuant to 1 VAC 17-20-150, if the review board disapproves the use of a design-build contract for a specific construction project, that same construction project may not be submitted to the review board for reconsideration for a period of 6 months from the date of disapproval.

JUDICIAL REVIEW

Va. Code § 11-41.2:5 and 1 VAC 17-20-160 provide that a public body which has been aggrieved by any action of the review board shall be entitled to a review of such action. Such appeals shall be conducted in accordance with the provisions of the APA.

SELECTION, EVALUATION, AND AWARD OF DESIGN-BUILD CONTRACTS

In accordance with Va. Code § 11-41.2:2.A and 1 VAC 17-20-170, prior to issuing an RFQ for a design-build contract for a specific construction project, the public body shall have adopted, by ordinance or resolution, written procedures

governing the selection, evaluation, and award of design-build contracts. Such procedures shall be consistent with those described in Va. Code § 11-37 for the procurement of nonprofessional services through competitive negotiation and shall also require RFPs to include and define the criteria of such construction projects in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the public body determines appropriate for that particular construction project.

As required by 1 VAC 17-20-170, such procedures shall, as a minimum, include procedures for:

1. development and preparation of the RFQ and the RFP;

2. preparation and submittal of qualifications by potential offerors in response to the RFQ and technical and cost proposals by prequalified offerors in response to the RFP;

3. evaluation of the qualifications of potential offerors and technical and cost proposals from prequalified offerors;

4. negotiations between the public body and prequalified offerors prior to the submittal of best and final offers (such procedures shall contain safeguards to preserve confidential and proprietary information supplied by those submitting proposals); and

5. award and execution of design-build contracts.

Evaluation Committee

1 VAC 17-20-180 requires the public body to appoint an evaluation committee of not less than three (3) members, one of whom shall be the architect or professional engineer employed by or under contract with the public body.

Request for Qualifications

The public body, in accordance with 1 VAC 17-20-190, must publish notice of its RFQ at least 10 days prior to the date set for receiving qualifications. This notice must be posted in a public area normally used for posting of public notices and in a newspaper or newspapers of general circulation in the area in which the contract is to be performed, so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit qualifications. In addition, qualifications may be solicited directly from potential offerors. The RFQ shall indicate in general terms that which is sought to be procured, specify the factors which will be used in evaluating the potential offeror's qualifications, and contain or incorporate by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the offeror. The RFQ shall request of potential offerors only such information as is appropriate for an objective evaluation of all potential offerors pursuant to such criteria. In addition, the public body shall establish procedures whereby comments concerning specifications or other provisions in the RFQ can be received and considered prior to the time set for receiving qualifications.

Selection of Qualified Offerors (Step I): Prequalification

As required by 1 VAC 17-20-200, the evaluation committee shall evaluate each responding potential offeror's qualifications submittal and any other relevant information, and shall select a minimum of two offerors deemed fully qualified and best suited among those submitting their qualifications on the basis of the selection criteria set forth in the RFQ. An offeror may be denied prequalification only upon those grounds specified in Va. Code § 11-46.

At least 30 days prior to the date established for submitting qualifications, the public body shall advise in writing each offeror who sought prequalification whether that offeror has been prequalified. In the event that an offeror is denied prequalification, the written notification to such offeror shall state the reasons for the denial and the factual basis of such reasons.

Request for Proposal

The public body shall prepare an RFP which, in accordance with Va. Code § 11-41.2:2.A.1 and 1 VAC 17-20-210.A, shall include and define the criteria of the specific construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications. The RFP may also define such other requirements as the public body determines appropriate for that particular construction project. In addition, the RFP shall define the criteria to be used by the evaluation committee to evaluate each proposal.

The public body shall establish procedures whereby comments concerning specifications or other provisions in the RFP can be received and considered prior to the time set for receiving proposals. 1 VAC 17-20-210.B.

At least 10 days prior to the date set for receiving proposals, the public body shall invite those potential offerors who have been previously prequalified to submit sealed technical and cost proposals. An offeror's cost proposal shall be sealed separately from its technical proposal. Upon receiving an offeror's technical and cost proposals, the public body shall secure and keep sealed the offeror's cost proposal until evaluation of all technical proposals is completed. 1 VAC 17-20-210.C.

Selection of Design-Builder (Step II)

The evaluation committee shall evaluate each technical proposals based on the criteria set forth in the RFP. Pursuant to 1 VAC 17-20-220.A, as a part of the evaluation process, the evaluation committee shall grant each offeror an equal

opportunity for direct and private communication with the evaluation committee; each offeror shall be allotted the same fixed amount of time. In its conversations with offerors, the evaluation committee shall exercise care to discuss the same owner information with all offerors. In addition, the evaluation committee shall not disclose any trade secret or proprietary information for which the offeror has invoked protection pursuant to Va. Code § 11-54.D.

Based upon its review of each offeror's technical proposal, the evaluation committee shall determine whether any changes to the RFP should be made to clarify errors, omissions, or ambiguities in the RFP, or whether to incorporate project improvements and/or additional details identified by the evaluation committee during its review. If such changes are required, an addendum shall be provided to each offeror. 1 VAC 17-20-220.B.

Based on any revisions to the technical proposals, the evaluation committee and an offeror may negotiate additive and/or deductive modifications to the offeror's cost proposal. In addition, an offeror may submit sealed additive and/or deductive modifications to its original sealed cost proposal which are not based upon revisions to the technical proposals. 1 VAC 17-20-220.C.

At the conclusion of this process, the evaluation committee shall publicly open, read aloud, and tabulate the cost proposals. The evaluation committee shall add to or deduct from the appropriate cost proposal any cost adjustments contained in amendments submitted by an offeror. 1 VAC 17-20-220.D.

The evaluation committee shall recommend the design-builder to the public body based on its evaluation and negotiations. Unless otherwise specified in the RFP, award of the design-build contract shall be made to the offeror who submits an acceptable technical proposal at the lowest cost. 1 VAC 17-20-220.E.

PROJECT EVALUATION (INCLUDING DELAYED OR ABANDONED PROJECTS)

Va. Code § 11-41.2:4.A.4 requires that the review board evaluate construction projects procured by design-build contracts entered into by public bodies, including cost and time savings; effectiveness of the selection, evaluation, and award of such contracts; and the benefit to the public body. In addition, Va. Code § 11-41.2:4.A.5 specifies that the review board shall report to the General Assembly and the governor on or before December 1, 1999, concerning the review board's evaluation of and findings regarding all design-build contracts undertaken by public bodies, and any recommendations relating to future use of design-build by such public bodies.

Accordingly, 1 VAC 17-20-310 provides that public bodies shall provide information as requested by the review board to allow the board to evaluate the project. Within 30 days after the execution of a design-build contract, the public body shall submit to the review board, at such intervals as specified by the review board on a form or forms provided by the board, three copies of the following documents and information:

1. the public body's RFQ;
2. the public body's RFP, including all addenda (if any);
3. the identification of all offerors responding to the RFP, including each offeror's cost proposal; and
4. the form of agreement and terms and conditions of the contract between the public body and the design-builder.

Within 90 consecutive calendar days after substantial completion, or, in the event of on-going claims or disputes, within 90 consecutive calendar days after project close-out, the public body shall submit three copies of the following documents and information to the review board:

1. a summary of any change orders, whether for a change in the scope of work, contract price, and/or time of performance, including a brief description of the change(s) to the original scope of work and the cause(s) for such change(s);
2. a comparison of estimated project cost under the traditional design-bid-build procedures and the total project cost (including, without limitation, all design fees) under the design-build procedures, as presented to the review board;
3. a comparison of the time estimated for substantial completion of the project under the traditional design-bid-build procedures and the time required for substantial completion of the project under the design-build procedures, as presented to the review board;
4. an analysis of the selection, evaluation, and award procedures employed by the public body for the selection of the design-builder.
5. an evaluation of the public body's written findings that (i) a design-build contract would be more advantageous than a competitive sealed bid construction contract; (ii) there would be a benefit to the public body in using a design-build contract; and (iii) competitive sealed bidding would not be practical or fiscally advantageous; and
6. current status of the project, including any outstanding issues including, but not limited to, final payment, claims, litigation, and warranties.

If, after receiving approval from the review board, the public body abandons or otherwise delays the utilization of a planned design-build contract, the public body shall, within 30 days of such decision, provide written notification to the review board. The public body's notification shall include information relative to each of the following:

1. the date of the public body's decision to abandon or otherwise delay utilization of its planned design-build contract,

2. the reason or reasons for the public body's decision to abandon or otherwise delay utilization of its planned design-build contract, and

3. in the event of a delay (as opposed to abandonment), the anticipated project re-activation date.

Conclusion and Recommendations

In order to employ a design-build contract for a specific construction project, the Commonwealth and its departments, institutions, and agencies must seek and secure the prior approval of the Director, DEB. For public bodies other than the Commonwealth and its departments, institutions, and agencies, the public body must seek and secure the approval of the Design-Build/Construction Management Review Board prior to using a design-build contract for a specific construction project.

To date, four localities have requested and received review board approval to use procurement methods other than competitive sealed bidding for specific construction projects--two design-build projects (Lee County Community Development shell industrial building; City of Falls Church fire station) and two construction management projects (New River Valley Regional Jail Authority 348 inmate facility; Tazewell County courthouse and jail). A review of these projects reveals the following insights for those public bodies who may be considering the use of design-build contracts:

- Public bodies should take care to avoid mere academic recitals of the advantages of design-build in its effort to justify the requirement that the public body demonstrate that (i) a design-build contract is more advantageous than a competitive sealed bid construction contract, (ii) there is a benefit to the public body in using a design-build, and (iii) competitive sealed bidding is not practical or fiscally advantageous. While it is appropriate for public bodies to espouse these advantages, public bodies should demonstrate how and why the advantages of design-build will be realized on their particular project. In addition, public bodies should demonstrate how the disadvantages of design-build will (i) be mitigated by actions of the public body or (ii) be outweighed by the advantages afforded the public body under a design-build contract.

- To demonstrate time savings, public bodies should prepare critical path method ("CPM") schedules (or equivalent graphical representations) for the project demonstrating both the forecasted project schedule under a traditional design-bid-build scenario and the forecasted project schedule under a design-build scenario. If an activity is common to both delivery systems, the public body should be sure to include that activity in both schedules. For example, if the public body generally requires 30 days to award a construction contract, both the design-bid-build schedule and the design-build schedule should reflect a 30-day contract award period. When calculating monetary savings, the public body should provide sufficient back-up data to enable the review board to conclude that the public body's reliance on the calculation of monetary savings was "reasonable." Once again, intellectual honesty is paramount. If the same construction duration is projected for both the design-bid-build scenario and the design-build scenario, common construction costs, such as mobilization and general conditions costs, should be reflected equally in cost comparisons.

Recall that the review board's rules and regulations forbid the resubmittal of a previously disapproved project for a period of 6 months from the date of disapproval. Thus, prior to submitting its request and supporting documentation to the review board, the public body should review its submittal in detail to ensure that it is error-free, complete, and unambiguous. A hastily prepared and submitted request for review will more likely than not support a conclusion by the review board that the public body's findings were "unreasonable" and thus led to the disapproval of the public body's request.

Notes

1. Terry R. Tennant, "Design-Build Professional Liability Insurance: Are You Covered," *Engineering News Record*, August 18, 1997, Special Advertising Section, p. I-24.

2. 77-78 Va. AG 91.

3. Ch. 95, 1980 Va. Acts 120, 121.

4. Ch. 615, 1983 Va. Acts 839.

5. Ch. 829, 1988 Va. Acts 1654.

6. Para. B, "Criteria for Use of Design-Build Contracts (D/B)," Procedures For Utilizing Design-Build (D/B) Contracts, in Chapter 11, "Special Procedures," December 1996 *Commonwealth of Virginia Construction and Professional Services Manual for State Agencies* (hereinafter referred to as the "State D/B Procedures").

7. State D/B Procedures, Para. C, "Procedures for Approval to Use D/B."

8. *Ibid.*, Para. D., "Design-Build Selection Procedures."

9. *Ibid.*, Para. D.2.a.

10. *Ibid.*, Para. D.1.

11. *Ibid.*, Para. D.2.b. While limiting the number of prequalified potential offerors to a maximum of five has appeal from an economy of administrative resources viewpoint, such a mandate may be in conflict with the provisions of Va. Code § 11-46. Section 11-46, which governs the prequalification of construction contractors, provides that a public body may deny prequalification to any contractor only if the public body finds one of the following: (1) "[t]he contractor does not have sufficient financial ability to perform the contract that would result from such procurement;" (2) "[t]he contractor does not have appropriate experience to perform the construction project in question;" (3) "[t]he contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management; (4) "[t]he contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause;" (5) "[t]he contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 4 (§ 11-72 et. seq.), (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et. seq.), (iii) Chapter 4.2 (§ 59.1-68.6 et. seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;" (6) "[t]he contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government;" and (7) "[t]he contractor failed to provide to the public body in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection." Thus, unless a public body can disqualify a potential offeror for one of the seven reasons stated in Va. Code § 11-46, the public body must prequalify that potential offeror.

12. *Ibid.*, Para. D.3.b.

13. *Ibid.*, Para. D.3.a. and b.

14. *Ibid.*, Para. D.3.b.

15. *Ibid.*, Para. D.3.c.

16. *Ibid.*, Para. D.3.d.

17. *Ibid.*, Para. D.3.e.

18. *Ibid.*, Para. D.3.a., f., and g.

19. *Ibid.*, Para. 3.D.h. and i.

20. See also, table "Projects Authorized Pursuant To § 11-41.2:1 For Public Bodies Other Than The Commonwealth" in "Final Report of the Joint General Laws Subcommittee Studying The Effect of Authorizing Design-Build and Construction Management Contracts For Public Bodies (HJR 643)," House Document No. 68, 1996, pp. 9-11 (hereinafter referred to as the "D-B/CM Authorization Report").

21. D-B/CM Authorization Report, p. 13.

22. *Ibid.*

23. Pursuant to Va. Code § 54.1-406.F, "a contractor who is licensed pursuant to the provisions of Chapter 11 (§ 54.1-1100 *et seq.*) . . . shall not be required to be licensed or registered to practice in accordance with this chapter when negotiating design-build contracts or performing services other than architectural, engineering or land surveying services under a design-build contract" so long as the "architectural, engineering or land surveying services offered or rendered in connection with such contracts [are] offered and rendered by an architect, engineer or land surveyor licensed in accordance with this chapter." There is no corresponding provision in Chapter 11 (§ 54.1-1100 *et seq.*) in favor of architects and engineers, exempting architects and engineers from licensing requirements relative to construction services to be offered or rendered under a design-build contract. Thus, at present, for a project to be constructed in Virginia, only contractors may enter into design-build contracts with owners.

24. D-B/CM Authorization Report, p. 14.

25. *Ibid.*

26. *Ibid.*, p. 15.

27. Ch. 962, 1996 Va. Acts 2344.

28. Va. Code § 11-41.2:3.A.

29. Va. Code § 11-41.2:3.B.

30. Va. Code § 11-41.2:3.C.

31. Now Chapter 11 of the December 1996 *Commonwealth of Virginia Construction and Professional Services Manual for State Agencies.*

32. Part XII, "Standards of Practice and Conduct," of the Virginia Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects (APELSLA) provides in 18 VAC 10-20-730.A that a

> "professional shall undertake to perform professional assignments only when

qualified by education or experience and licensed or certified in the profession involved. The professional may accept an assignment requiring education or experience outside of the field of the professional's competence, but only to the extent that services are restricted to those phases of the project in which the professional is qualified. All other phases of such project shall be the responsibility of licensed or certified associates, consultants or employees."

Thus, for a typical building project, which requires architectural, civil engineering, structural engineering, mechanical engineering, and electrical engineering experience and expertise, the typical city or county engineering division may lack the requisite experience and expertise in all required disciplines. Thus, association with one or more consultants may be required.

33. 1 VAC 17-20-130.A provides that an alternative review period may be established by agreement between the review board (or its designee) and the public body "if (i) the review board will be unable to act upon the public body's written request for review of a specific construction project within 60 days from the date of receipt of the public body's written request, (ii) the public body requires additional time to assimilate and submit any additional information required by the review board pursuant to 1 VAC 17-20-140, (iii) additional time is required for the scheduling of the public body's appearance before the review board, or (iv) any other mutually acceptable cause or reason." 1 VAC 17-20-130.B further provides, however, that "[i]n no event shall any alternative review period require a decision by the review board in less than 60 days from the date of receipt of the public body's written request for review."

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